(3) (2)

Nos. 87-1835 and 87-1836

In the Supreme Court of the United States

OCTOBER TERM, 1988

CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

CALIFORNIA PUBLIC UTILITIES COMMISSION, PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DENNIS G. LINDER
WM. ROBERT IRVIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HARVARD P. SPIGAL
General Counsel
Bonneville Power Administration
Portland, Oregon 97208

QUESTIONS PRESENTED

1. Whether the Near Term Intertie Access Policy (NTIAP) adopted by the Bonneville Power Administration (BPA), which does not impose any charges for BPA power or for transmission of nonfederal power, is nevertheless a "rate[ ] or rate schedule[ ]" within the meaning of 16 U.S.C. 839e(k).

2. Whether the NTIAP's distinctions between Northwest utilities and extraregional utilities comply with BPA's statutory obligations to "ma[k]e available" excess capacity on the Pacific Northwest-Pacific Southwest Intertie "as a carrier for transmission of other electric energy" (16 U.S.C. 837e), and to "make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which [the Administrator of BPA] determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States" (16 U.S.C. 838d).

3. Whether the NTIAP is invalid on the ground that it does not promote competition to the maximum extent possible.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 831 F.2d 1467.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1987. A petition for rehearing was denied on February 4, 1988 (Pet. App. C1-C2). The petitions for a writ of certiorari were filed on May 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bonneville Power Administration (BPA) is an independent, self-financed power marketing agency within the United States Department of Energy. BPA's operations are governed by the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839-839h; the Bonneville Project Act of 1937, 16 U.S.C. 832-832*l*; the Pacific Northwest-Pacific Southwest Regional Preference Act (Regional Preference Act), 16 U.S.C. (& Supp. IV) 837-837h; and the Federal Columbia River Transmission System Act (Transmission System Act), 16 U.S.C. 838-838k.

In addition to marketing hydroelectric power generated by 31 federal dams in the Pacific Northwest, BPA operates a system of electric power transmission lines within the Pacific Northwest.[1] BPA transmits both federal and nonfederal firm power (*i.e.*, power that is assured to be continuously available) and nonfirm power (*i.e.*, power that is available only when supply exceeds firm power commitments) on its transmission lines. Nonfederal power is transmitted over capacity not required for BPA's own use.

Among BPA's transmission lines is a large portion of the Pacific Northwest-Pacific Southwest Intertie, a congressionally authorized system of transmission lines that allows the Pacific Northwest and Pacific Southwest to exchange power when one region has a surplus and the other has heavy demand (16 U.S.C. 838-838k). BPA owns and operates most of the Intertie lines north of the Oregon-

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[1] The Pacific Northwest is defined by statute (16 U.S.C. 837(b)) as (1) Oregon, Washington, Idaho, and Montana east of the continental divide; (2) parts of Nevada, Utah, and Wyoming that are within the Columbia River drainage basin; and (3) contiguous areas within 75 miles of the above.

California border, and California utilities own the lines south of Oregon (Pet. App. A4). The lines were approved by Congress primarily to improve BPA's ability to meet its obligation to repay the United States Treasury for loans made to BPA in order to construct Northwest hydroelectric facilities (*id.* at B18, E93-E94). BPA is currently obligated to repay the Treasury on a timely basis more than $8 billion of federal investments in the Federal Columbia River Power System. BPA has more than a contractual obligation to repay those investments: Congress has made repayment one of BPA's statutory duties (see 16 U.S.C. 832f, 838g(3), 839e(a)(1)).

2. In 1969, very shortly after the Intertie became operational, BPA entered into a contract with several Northwest utilities known as the "Exportable Agreement" (Pet. App. M1-M28). The Exportable Agreement takes effect under certain conditions in which Northwest utilities have more power available to sell than the available Intertie capacity. It allocates the capacity of the Intertie pro rata among BPA and the Northwest utility signatories. Others, such as Canadian utilities, are not allowed access to the Intertie under the Exportable Agreement. No one has ever before challenged the Exportable Agreement on the ground that its pro rata allocation mechanism unlawfully restricts competition among Northwest utilities or that BPA has a statutory obligation to allow Canadian sellers access to the Intertie.

For most of the life of the Intertie, BPA has allowed access to the Intertie on a first-come, first-served basis when the Exportable Agreement has not been in effect. Although petitioner California Energy Resources Conservation and Development Commission (CEC) maintains that this generous access policy represented BPA's view of its statutory obligations (CEC Pet. 7), CEC cites nothing

whatsoever to support that contention, and BPA has never expressed the view that CEC attributes to it. To the contrary, BPA granted access on a first-come, first-served basis not because it believed it had any statutory obligation to do so but because BPA's ability to meet its Treasury payment obligation had not yet been put in jeopardy by various power supply and other factors. See generally Pet. App. D7-D8, E4-E5, E88-E100.

Conditions had changed dramatically by the early 1980s. The Northwest suffered an economic recession in the midst of sharply rising electric power rates, thus decreasing the amount of energy that BPA (and others) could sell in the Northwest. Combined with higher than average water years and surplus generating resources, these conditions created a large surplus of power in the Northwest, and on BPA's system in particular. The existence of a power surplus created competing demands for BPA's Intertie capacity among Northwest suppliers. In addition, BPA in particular experienced serious revenue shortfalls when its direct service aluminum industrial customers, the source of one-third of its power revenues, initiated significant cutbacks in response to world aluminum prices. Some plants were shut down. Pet. App. B9-B10.

In addition to the Northwest power surplus, other factors necessitated action by BPA. Unlike the northern portion of the Intertie, which is predominantly under federal control, the southern portion of the Intertie (within California) is controlled almost exclusively by three huge California utilities and the City of Los Angeles. These companies comprise an entity called the California Power Pool, which maintains tight control over access to the southern portion of the Intertie through a complicated contract called the Pacific Intertie Agreement. Through

that agreement, the utilities have prevented other utilities in California and the Southwest from gaining access to the Intertie and have agreed not to share excess Intertie capacity among themselves. These practices limit competition for Northwest power and depress prices for Northwest suppliers. See *Pacific Gas & Elec. Co.*, 26 F.E.R.C. ¶ 63,048 (1984); Pet. App. A18-A20, E51, E67-E69, E73-E74, E76-E77, E82, H11-H13.

In light of all of these circumstances, BPA's ability to comply with its statutory obligation to repay the Treasury for federal expenditures was in jeopardy. BPA thus determined in the early 1980s that it had become necessary to promulgate formal policies governing access to the Intertie.

3. To allocate the limited transmission capacity of the federal portion of the Intertie among utilities, BPA has adopted Intertie access policies on three occasions. On September 7, 1984, BPA promulgated an interim Near Term Intertie Access Policy (NTIAP). See 49 Fed. Reg. 44232 (Pet. App. D1-D33). The Los Angeles Department of Water and Power challenged that policy in the Ninth Circuit, contending that its adoption was an abuse of discretion and beyond BPA's statutory authority. In 1985, the court of appeals rejected those contentions and upheld the interim NTIAP. See *Department of Water & Power of the City of Los Angeles* v. *Bonneville Power Administration*, 759 F.2d 684 (9th Cir. 1985) (*LADWP*) (Pet. App. B1-B26).

Also in 1985, the California Public Utilities Commission (CPUC), along with several California investor-owned utilities, filed a petition with the Federal Energy Regulatory Commission (FERC), contending that BPA's adoption of the interim NTIAP was a rate action requiring ratemaking proceedings and approval by FERC. Both ini-

tially and in response to requests for rehearing, FERC held that the NTIAP was not a rate, and it denied the petition. See *Public Utilities Comm'n of California* v. *United States Dep't of Energy*, 33 F.E.R.C. ¶ 61,235 (1985), reh'g denied, 39 F.E.R.C. ¶ 61,088 (1987).

On June 1, 1985, BPA adopted a revised NTIAP, which was substantially identical to the interim NTIAP (see Pet. App. A6). 50 Fed. Reg. 26827 (Pet. App. G1-G31). That policy, along with the interim NTIAP, was challenged in the Ninth Circuit by petitioners in this case. The court of appeals upheld the revised NTIAP as well (*id.* at A1-A27).

On May 17, 1988, BPA finalized its Long-Term Intertie Access Policy (LTIAP).[2] The final LTIAP has superseded the interim and revised NTIAPs.[3]

3. The interim and revised NTIAPs are the subject of these petitions. Under the NTIAP, firm transmission was provided for firm power sales between Pacific Northwest utilities and California purchasers. This was a new service provided by BPA to nonfederal utilities. Assured service for transmission of firm power generated by utilities outside the Pacific Northwest (extraregional utilities), including Canadian utilities, was not available. Pet. App. G10, G21.

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[2] We are lodging with the Clerk a copy of the LTIAP, with attached Executive Summary [hereinafter LTIAP Executive Summary], and a copy of the accompanying Administrator's Decision [hereinafter LTIAP Administrator's Decision].

[3] One aspect of the LTIAP has not yet taken effect. Section 5(d) of the LTIAP provides for an 18-month experiment in which, under certain conditions, no specific utility other than BPA will be given a pro rata allocation of the Intertie capacity, but rather Northwest utilities (and, in certain circumstances, other utilities) will compete among themselves to arrange transactions using the Intertie. That experiment requires considerable advance planning (see LTIAP Administrator's Decision 66-69; LTIAP Executive Summary 7-9) and has not yet begun.

The NTIAP established three different allocation scenarios for the transmission of nonfirm power. Under Condition 1—generally when streamflows throughout the Northwest are so high that water not used for hydroelectric generation will spill over the dams and thus be wasted—Intertie capacity was allocated according to the terms of the Exportable Agreement, *i.e.*, on a pro rata basis among BPA and Northwest generating utilities for transmission of surplus nonfirm energy to California. Pet. App. G21. The allocation was made on the basis of daily and hourly declarations of available surplus power that Northwest utilities are willing to sell at BPA's applicable rate. This was because, under the Exportable Agreement, the utilities generally sell their allocations to BPA, which then markets it at the federal rate to California utilities as federal surplus.

Condition 2 denominated the situation in which BPA and Northwest utilities had enough surplus nonfirm energy to fill BPA's Intertie capacity, but only if higher priced surplus was included in the declarations. Intertie access was divided among BPA and Northwest utilities on a pro rata basis. Each utility made its own sales arrangements with California buyers. Under Condition 2, extraregional utilities had no access to the Intertie. Canadian utilities could obtain access, however, if they agreed to greater coordination of their hydrosystem with that of the Pacific Northwest or agreed to provide other appropriate consideration. Pet. App. G20, G21.

Under Condition 3, when BPA and Northwest utilities did not have enough surplus nonfirm energy to fill Intertie capacity, the available Intertie capacity was allocated first to meet their needs. Thereafter, extraregional utilities including Canadian utilities had access to remaining Intertie capacity (Pet. App. G21).

4. Petitioners brought these suits, pursuant to 16 U.S.C. 839f(e)(5), in the United States Court of Appeals for the Ninth Circuit. Petitioners contended that the NTIAP constituted ratemaking and was thus subject to FERC review and approval (Pet. App. A7). Petitioners further contended that the NTIAP was not factually justified and was therefore arbitrary, capricious, and an abuse of discretion (*id.* at A13). Also, petitioners contended that the NTIAP discriminated against extraregional utilities in violation of 16 U.S.C. 837e and 838d (Pet. App. A14). In addition, petitioners contended that the NTIAP failed to conform to the maximum extent possible to federal antitrust laws and policies (*id.* at A15). Finally, petitioners contended that the NTIAP discriminated against new generating sources in violation of 16 U.S.C. 837e and 839f(d) (Pet. App. A20).

5. The court of appeals rejected each of petitioners' claims. The court of appeals held that the NTIAP did not constitute ratemaking because it did not establish or change the charges assessed by BPA for sales of its power or transmission services (Pet. App. A10-A11). As the court of appeals recognized, the NTIAP "at most" affected nonfederal power prices, and FERC review is required only for BPA's rates for federal power sales and transmission of nonfederal power (*ibid.*).

With regard to petitioners' claim that the NTIAP was not factually justified, the court of appeals recalled its previous holding in *LADWP* that the interim NTIAP was designed by BPA to mitigate projected revenue shortfalls and allow it to meet its Treasury payments and, thus, " 'the policy is not only statutorily authorized but statutorily mandated' " (Pet. App. A14 (quoting *id.* at B20)). Noting that petitioners had conceded that the interim NTIAP was identical to the revised NTIAP and had

pointed to nothing in the record of the revised NTIAP that would require reexamination of the justification identified in *LADWP*, the court of appeals held that it was bound by its earlier determination in *LADWP* that the interim NTIAP was factually justified (*id.* at A14).

Similarly, the court of appeals held that its previous determination in *LADWP* that " 'BPA is required to allocate use of federally-owned transmission facilities in a manner which accords preference first to transmission of federal power and then to transmission of other Northwest-generated power' " foreclosed petitioners' claim that the NTIAP unlawfully discriminated against extraregional utilities (Pet. App. A14-A15 (quoting *id.* at B25)).

In rejecting petitioner's antitrust claims, the court of appeals held that, though BPA is exempt from the antitrust laws, it is obligated "to consider the interests of preserving competition" (Pet. App. A15-A16). The court stated, however, that this obligation does not override BPA's statutory obligation to be fiscally self-supporting (*id.* at A16). Further, the court noted that petitioners' proposal for allocation of Intertie capacity under Conditions 1 and 2 was not raised in the administrative proceedings leading to the NTIAP, and therefore BPA had not had an opportunity to consider petitioners' alternative (*id.* at A17).[4] The court observed, however, that BPA had evaluated two other alternatives closely related to petitioners' alternative (*id.* at A17-A18). Reviewing the administrative record, the court of appeals held that BPA had reasonably balanced antitrust concerns with its other statutory obligations (*id.* at A17-A20).[5]

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[4] Petitioners' proposal is being tested in the LTIAP. See note 6, *infra*.

[5] Finally, the court of appeals rejected petitioners' claim that the NTIAP unlawfully discriminated against new generating sources,

ARGUMENT

1. We discuss below the reasons why petitioners' challenges to the decision of the court of appeals are without merit. We note first, however, that there are reasons apart from the merits why this Court should not review that decision.

First, there is a conceded "absence of a conflict in the circuits" (CEC Pet. 18). Although the exclusive jurisdiction granted to the Ninth Circuit by 16 U.S.C. 839f(e)(5) makes this an area of the law in which such conflicts inherently do not develop, that does not by itself make the absence of any such conflict "irrelevant" (*ibid.*). Rather, it means that petitioners must shoulder the burden of showing some other reason why this case is so important, and the decision below of such dubious correctness, that review by this Court is warranted. We submit that they have not met that burden.

Second, the access policies that petitioners challenge were superseded by the LTIAP on May 17, 1988, and any challenge to those policies is, in most respects, now moot.[6]

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holding that in this respect BPA had reasonably acted to fulfill its statutory obligation to protect fish and wildlife in the Columbia River basin (Pet. App. A21-A23). The court of appeals also noted that the exclusion was only temporary, as BPA would be considering the issue anew in developing the LTIAP (*id.* at A25). Petitioners have not asked this Court to review this issue.

[6] The NTIAP's pro rata allocation under Conditions 2 and 3 remains temporarily in effect while BPA and affected utilities work out the details of implementation of Section 5(d) of the LTIAP, which (as an experiment) will accept petitioners' proposal to let market forces rather than pro rata allocations determine nonfederal Northwest (and, under Condition 3, Canadian) utilities' access to the Intertie. See generally LTIAP Administrator's Decision 48-71. Thus, although petitioners' challenge to the NTIAP is not yet moot in this respect, it soon will be, and a grant of certiorari to review an aspect of the

Although the LTIAP does retain some of the features that petitioners find objectionable, the proper course is for them to raise whatever objections they still have in a new proceeding in the Ninth Circuit, not to seek an advisory opinion from this Court on the validity of a now-superseded policy as a means to attack the policy that is now in effect.[7]

For these prudential reasons, the Court should deny certiorari. As we now show, the decision below also is correct.

2. a. Petitioner CPUC, but not petitioner CEC, argues that the NTIAP is a "rate[ ] or rate schedule[ ]" within the meaning of 16 U.S.C. 839e(k) and that BPA therefore could not implement it without first obtaining approval from FERC (CPUC Pet. 8-11). CPUC argues that the amount of money that California ratepayers expend for energy will be affected by the NTIAP and infers from that argument that FERC approval is required. Noticeably lacking from CPUC's discussion, however, is any statutory language, legislative history, or relevant case law to support CPUC's contention.[8]

NTIAP that has been very significantly altered in the LTIAP would be most inappropriate. Additionally, the LTIAP maintains the distinction between Northwest utilities and extraregional utilities, although it will treat Canadian utilities equally with U.S. extraregional utilities if the United States-Canadian Free Trade Agreement is ratified by both countries.

[7] On July 19, 1988, CEC in fact filed a petition for review of the LTIAP in the Ninth Circuit.

[8] CPUC cites several Ninth Circuit cases, but the court below had no difficulty distinguishing those same cases (Pet. App. A7-A13). In any event, if there were an intracircuit conflict between the cases that CPUC cites and the decision below, it would be one for the Ninth Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CPUC's claim that the NTIAP constituted ratemaking has had multiple reviews, twice by FERC, the administrative body charged with review of BPA's ratemaking actions, and once by the court of appeals (Pet. App. A7-A13; *Public Utilities Comm'n of California* v. *United States Dep't of Energy,* 33 F.E.R.C. ¶ 61,235 (1985), reh'g denied, 39 F.E.R.C. ¶ 61,088 (1987)). On all occasions, the conclusion was that the adoption of the NTIAP did not constitute ratemaking. As the court of appeals recognized, the adoption of the NTIAP did not impose any charges for power, define any formula for computing charges, or authorize BPA to alter its own charges for power and, consequently, was not ratemaking (Pet. App. A10-A13). Similarly, FERC concluded that "[o]ther BPA actions, although they may arguably have an impact on the revenues that BPA receives from sales of power and energy, are beyond the scope of the Commission's authority over BPA" (33 F.E.R.C. at 61,489). CPUC's claim here, that neither the court of appeals nor FERC itself understood the scope of FERC's jurisdiction, is without basis.

b. Both petitioners contend that BPA has a statutory obligation to grant Canadian generating utilities access to the Intertie on the same terms as Northwest utilities; and that BPA has a statutory obligation to require generating utilities that wish to make sales to California to compete for Intertie access, so that BPA may not instead make pro rata allocations of Intertie capacity to such utilities under any conditions (CPUC Pet. 11-13; CEC Pet. 18-23). The statutory provisions alleged to create those immutable duties are 16 U.S.C. 837e, enacted in 1964, which requires BPA to "ma[k]e available" excess Intertie capacity "as a carrier for transmission of other electric energy," and 16 U.S.C. 838d, enacted in 1974, which requires BPA to

"make available to all utilities on a fair and nondiscriminatory basis, any capacity in the federal transmission system which [the Administrator of BPA] determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States."

Petitioners' reading of these statutes should prevail, of course, only if BPA's contrary view is an unreasonable one; to the extent that a statute can reasonably be construed in more than one way this Court's consistent practice is to defer to the interpretation adopted by the agency charged with administering the statute. See, *e.g.*, *Aluminum Co. of America* v. *Central Lincoln Peoples' Utils. Dist.*, 467 U.S. 380, 389-390 (1984) (deference to interpretation of Northwest Power Act by Administrator of BPA); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 865 (1984) (deference to administrative interpretation because multiple public and private interests were involved in developing the proposed legislation but were not addressed in detail by the legislation); *K mart Corp.* v. *Cartier, Inc.*, No. 86-495 (May 31, 1988), slip op. 8; *EEOC* v. *Commercial Office Prods. Co.*, No. 86-1696 (May 16, 1988), slip op. 7; *Lukhard* v. *Reed*, No. 85-1358 (Apr. 22, 1987), slip op. 1 (Blackmun, J., concurring in the judgment) ("In a statutory area as complicated as this one, the administrative authorities are far more able than this Court to determine congressional intent in the light of experience in the field."); *United States* v. *City of Fulton*, 475 U.S. 657, 667 (1986); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524, 532 & n.21 (1985).[9]

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[9] BPA's construction of its statutory authority, as upheld by the Ninth Circuit in *LADWP* and subsequently in the present case, is entitled to even greater deference than that usually paid to administrative constructions because Congress has, since *LADWP*, twice passed

With that principle in mind, there is no doubt that the Ninth Circuit properly upheld BPA's construction of the statutes at issue.

Section 837e, passed in 1964 as part of the Regional Preference Act, does not support petitioners' position. The statutory language simply requires BPA to make excess Intertie capacity available as a carrier. In the NTIAP, BPA certainly makes available excess Intertie capacity as a carrier for transmission of energy between the Pacific Northwest and California as well as between Canada and California; the whole point of the access policy is to state the conditions on which BPA will do just that. Petitioners can make no plausible showing that anything in the language of Section 837e constrains BPA's choice of conditions for nonfederal access to excess Intertie capacity or requires it to transmit Canadian power on the same terms as Northwest power. See Pet. App. E13-E16; see also 16 U.S.C. 838(a) (describing purpose of Regional Preference Act as "the marketing of electric power from hydroelectric projects in the Pacific Northwest").

Nor does the legislative history of the Regional Preference Act, read as a whole, support a reading of Section 837e that would require BPA to transmit Canadian power on the same terms as Northwest power. The House report

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legislation on closely related matters and has specifically declined to overturn BPA's and the Ninth Circuit's statutory interpretations. See LTIAP Administrator's Decision 47 (quoting Pub. L. No. 99-88, 99 Stat. 293; 132 Cong. Rec. S 15388 (daily ed. Oct. 6, 1986)). "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974) (footnotes omitted)).

states that the Administrator "may"—not "must"—"enter into agreements for the wheeling of energy generated in Canada." H.R. Rep. 590, 88th Cong., 1st Sess. 9 (1963).[10] And Congress was well aware when it passed the Act that the Executive Branch officials responsible for its implementation understood the Act to require transmission of Pacific Northwest energy, not Canadian energy, over available Intertie capacity and to permit pro rata allocation.

The Department of the Interior (within which BPA was then located) reported to Congress that "BPA has assured the public and private utilities *of its service area* access over [BPA's] lines to California, Nevada, and Arizona markets, proportionate to the respective surpluses of the various utilities." U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 27 (Comm. Print 1964) (emphasis added) [hereinafter *Interior Department Report*]. The conference committee endorsed that report in recom-

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[10] The same sentence proceeds to say that "such energy stands on the same basis as any other non-Federal energy." As the next sentence makes clear, however, the point of that statement is to clarify that Canadian energy, other than so-called "Canadian Treaty energy" given special rights by treaty and by statute (16 U.S.C. 837h), *lacks* priority rights to use of the Intertie. See H.R. Rep. 590, *supra*, at 9 ("It [Canadian non-Treaty energy] does not have the priority granted to Federal energy and Canada's entitlement to downstream power benefits under the proposed treaty."). The statement that Canadian energy "stands on the same basis as any other non-Federal energy" cannot fairly be read, in context, as supporting the proposition that Canadian energy *must* be afforded rights as great as those afforded to Northwest energy. Otherwise, BPA would have no incentive to provide *any* service to Canada if, when it did provide service, it had to be on the same terms as that provided to Northwest utilities.

mending passage of the Act. H.R. Conf. Rep. 1822, 88th Cong., 2d Sess. 3-4 (1964); see also *id.* at 5 (emphasis added) (reprinting letter from Secretary of the Interior stating that "the regional interties between the Pacific Northwest and the Pacific Southwest, as proposed by the Department of the Interior, * * * would link all major electric systems—public, private, and Federal—*in both regions*"). And BPA's earliest implementation of the legislation, in the Exportable Agreement, demonstrates BPA's longstanding view, never disturbed by the courts or by Congress,[11] that BPA has the authority to arrange pro rata allocations of Intertie capacity and to exclude Canadian energy.[12]

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[11] On January 17, 1969, the Secretary of the Interior transmitted to the House Committee on Public Works Appropriations copies of the Exportable Agreement and other Intertie agreements for review, as required by congressional committees that approved appropriations for Intertie construction (H.R. Conf. Rep. 1794, 88th Cong., 2d Sess. 42 (1964); see S. Rep. 1326, 88th Cong., 2d Sess. 37 (1964)). We are lodging a copy of the Secretary's letter with the Clerk. Significantly, the parties to those agreements were limited to Northwest and Southwest utilities and did not include any Canadian utility. The Secretary stated that the " 'fair share' or 'equitable sharing' of excess energy markets in California and the Northwest by all utilities desiring to use the Intertie for sale of excess energy" had been stressed by the Department to Congress. He concluded that "[t]he enclosed agreements have been negotiated with the intent to satisfy these prior commitments contractually." As the court below stated (Pet. App. B14-B15, quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)):

> Congress has, for nearly half a century, monitored BPA performance in electricity regulation and allocation. Statutory interpretations offered by BPA represent "contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are as yet untried and new."

[12] Furthermore, throughout the legislative history all who described the benefits that would accrue from an Intertie system discussed

Petitioners place greater emphasis on the requirement of "fair and nondiscriminatory" availability of Intertie capacity in 16 U.S.C. 838d, added by the Transmission System Act in 1974, but that language also will not bear the weight petitioners place on it. The legislative history shows that the sole purpose of Section 838d was to make clear BPA's obligation to treat publicly owned utilities and investor-owned utilities alike in granting access to its transmission system. See H.R. Rep. 93-1375, 93d Cong., 2d Sess. 5 (1974) ("Section 6 [16 U.S.C. 838d] provides that the Administrator of BPA shall not discriminate between public and private power entities in contracting for use of transmission line capacity which is surplus to the Administrator's requirements for transmitting Federal power.").[13] It would be a serious misreading of Section 838d to construe the statute as a roving mandate for courts to require "equal" treatment of any two utilities that a court might regard as similarly situated.[14]

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benefits accruing to the Pacific Northwest and the Pacific Southwest. See H.R. Conf. Rep. 1822, *supra*, at 7 (reprinting letter from Secretary of the Interior); H.R. Rep. 590, *supra*, at 2; *Interior Department Report* 32. No mention was made of Canada, either in relation to the benefits flowing to Canada or in relation to California benefits as being dependent on the flow of non-Treaty Canadian power. Indeed, even Canadian Treaty power was power generated in the Northwest and owned by entities in the Northwest after a power sales transaction that was closely tied to the ratification of the Treaty by Canada (*Interior Department Report* 33).

[13] This statutory provision thus stands in contrast to BPA's obligation as a seller (rather than transmitter) of power "at all times * * * [to] give preference and priority to public bodies and cooperatives" (16 U.S.C. 832c(a)).

[14] It would be an even more radical departure from congressional intention to read Section 838d as an open-ended invitation for courts to determine what constitutes "fair[ness]" and "discriminat[ion]" in the relative treatment of the Pacific Northwest and California. That

In particular, it would be directly contrary to Congress's intention if the statute were read to mandate identical treatment of generating utilities in Canada and the Pacific Northwest. See H.R. Rep. 93-1375, *supra*, at 5 ("The Committee further expressly points out that Section 6 is not intended to represent a policy having application other than in the Pacific Northwest * * *."); S. Rep. 93-1030, 93d Cong., 2d Sess. 10 (1974) (same); *id.* at 9 (emphasis added) (describing overall purpose of Transmission System Act as "carry[ing] out the directives and policies contained in previous legislation relating to the production and distribution of electrical power *in and from the Pacific Northwest*").

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novel statutory construction, first adopted by Judge Norris in dissent below (Pet. App. A25-A26 & n.1) and now echoed by petitioner CEC, finds no support in any legislative history or any judicial intepretation of similar phrases, and it would send the courts on a wholly uncharted journey. For example, whereas petitioners can decry perceived discrimination and unfairness in BPA's failure to let market forces operate on the northern portion of the Intertie, Northwest utilities and consumers could just as easily decry perceived discrimination and unfairness if BPA failed to take steps to counteract the monopsony power of the owners of the southern portion of the Intertie. Likewise, while petitioners insist that BPA should be judicially required to raise its rates to Northwest customers rather than recovering costs from California customers (CEC Pet. 25-26), a FERC administrative law judge has criticized BPA for "grossly undercharg[ing]" nonfirm customers (which were principally in California and the Southwest), resulting in unfair treatment of BPA's firm customers, which are in the Northwest. *U.S. Department of Energy, Bonneville Power Administration*, 29 F.E.R.C. ¶ 63,039, at 65,122 (1984). In any event, BPA has studied the relevant benefits that the Intertie would provide to each region with and without the adoption of an access policy and has determined that an access policy does in fact distribute the benefits to each region more equally than would market forces operating in the absence of such a policy, which would allow California a disproportionate share of the benefits (Pet. App. E37-E39; LTIAP Administrator's Decision 168-171).

In sum, there is no statute that can fairly be construed to impose on BPA an obligation to give identical treatment to Pacific Northwest energy and extraregional energy in allocating access to the Intertie, nor can any statute even remotely be read to forbid BPA's adoption of a pro rata allocation system among those to whom Intertie access is granted.[15]

c. Contrary to petitioners' assertion, the decision of the court of appeals regarding antitrust considerations does not conflict with any decision of this Court.[16] Peti-

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[15] In addition, construing Section 837e or Section 838d to require BPA to afford "equal access" to extraregional utilities would create serious anomalies in the overall statutory scheme. To take one example, the Regional Preference Act places significant restrictions on BPA and Northwest utilities with respect to the transactions they make with California utilities in order to preserve for Northwest use the region's significant hydroelectric potential. BPA cannot sell surplus energy without a contractual right to terminate the sale on 60 days' notice if the energy is needed in the Northwest (16 U.S.C. 837b(a)). Nonfederal Northwest utilities cannot sell firm hydroelectric surplus energy to California without suffering a decrement in their ability to rely on BPA for firm power (16 U.S.C. 837b(d)). No such statutory limitations have ever been placed on Canadian or other extraregional utilities. To argue that Congress intended extraregional utilities to be treated equally to Northwest utilities is to argue that Congress intended Northwest utilities to compete at a disadvantage with extraregional utilities. See Pet. App. E184-E190.

[16] The decision, however, is the first in which a nonregulatory federal agency's obligation to consider the effect of its policies on competition has been decided. The cases that petitioners cite involve only regulatory agencies implementing their own unique statutory directives. See generally *Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953, 959 (D.C. Cir. 1968). Though federal agencies are not governed by the antitrust laws (*Jet Courier Serv.* v. *Federal Reserve Bank*, 713 F.2d 1221 (6th Cir. 1983); *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982); *Champaign-Urbana News* v. *J.L. Cummins*, 632 F.2d 680 (7th Cir. 1980)), BPA itself undertook a consideration of the NTIAP's effects

tioners, relying on *Gulf States Utils. Co.* v. *FPC*, 411 U.S. 747, 763 (1973), contend that the court of appeals did not "closely scrutinize" BPA's adoption of the NTIAP in light of antitrust concerns (CPUC Pet. 14). Petitioners misread *Gulf States* and its application to the present case.

In *Gulf States*, the Court recognized that the Federal Power Commission had an obligation, under its Federal Power Act directive to protect the "public interest" (16 U.S.C. 824c(a)), to "consider anticompetitive aspects" of its actions, but the Court also recognized that the Commission had discretion in the manner in which it did so (411 U.S. at 762-763). Only if the Commission had summarily disposed of antitrust concerns, or failed to consider such concerns at all, was the reviewing court's "close scrutiny" of the Commission's exercise of its discretion triggered (*id.* at 763). See also *Maryland People's Counsel* v. *FERC*, 761 F.2d 780, 785-786 (D.C. Cir. 1985).

In the present case, as the court of appeals recognized, BPA considered anticompetitive aspects of the NTIAP (Pet. App. A18-A19). Unlike the Federal Power Commission in *Gulf States*, BPA neither failed to consider anticompetitive aspects nor summarily disposed of such concerns. Accordingly, the court of appeals was correct in restricting its review of BPA's adoption of the NTIAP to determining whether BPA had struck a reasonable balance

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on competition during the development of the NTIAP. Pet. App. E63-E84, F1-F4, F5, G5, H2, H10-H17, H21-H31, H71-H76. Consequently, if there is any real issue here, it is whether BPA's duty to consider such effects is *less* stringent than that of regulatory agencies with jurisdiction over private behavior in the marketplace. Compare the "public interest" standard of the *Gulf States* case (discussed below) with the precautionary standard in Section 9(i)(3) of the Northwest Power Act, 16 U.S.C. 839f(i)(3), that access should be granted to BPA's transmission facilities only if such services can be furnished "without substantial interference with [the Administrator's] power marketing program."

between antitrust concerns and BPA's statutory obligation to be fiscally self-supporting (Pet. App. A15-A20).

Petitioners also contend that BPA is obligated to "maintain[ ] competition to the maximum extent possible consistent with the public interest" (CPUC Pet. 14, citing *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973)), and to conform its conduct, "to the maximum feasible extent," to antitrust policies (CEC Pet. 24, citing *Latin America/Pacific Coast Steamship Conf.* v. *Federal Maritime Comm'n,* 465 F.2d 542, 547 (D.C. Cir.), cert. denied, 409 U.S. 967 (1972), and *Northern Natural Gas Co.* v. *FPC,* 399 F.2d 953, 961 (D.C. Cir. 1968)). Apparently, petitioners would have BPA take extraordinary steps, at the expense of all other considerations, to accommodate antitrust concerns. Neither the decisions of this Court nor those of any court of appeals impose such a requirement.

In *Otter Tail,* contrary to petitioners' implication, the issue before the Court was not whether a regulatory agency must maintain competition to the maximum extent possible. Rather, it was whether Congress intended to exempt electric utilities from antitrust liability in court when it provided the Federal Power Commission with the regulatory responsibilities contained in the Federal Power Act, 16 U.S.C. 791a *et seq.* Because "the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest" (410 U.S. at 374), the Court held that it could not assume that Congress intended such an exemption. The Court's opinion in *Gulf States,* issued less than three months after *Otter Tail,* underscores the point. In *Gulf States,* the Court merely held that the Federal Power Commission had a "responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate util-

ity operations" (411 U.S. at 758-759). The Court did not hold that the Commission had to maintain competition to the maximum extent possible. Similarly, the court of appeals in the present case held that BPA has an obligation to consider "the interests of preserving competition" (Pet. App. A15-A16). Thus, the balancing approach recognized by the court of appeals in the present case is precisely the approach taken by this Court in prior cases.

Nor do the other cases on which petitioners rely support their contention that BPA is required to take extraordinary steps to accommodate antitrust concerns. In *Latin America/Pacific Coast Steamship,* the D.C. Circuit recognized that an agency's statutory obligations may override antitrust concerns (465 F.2d at 547). It was also interpreting a different statute, the Shipping Act, 1916, 46 U.S.C. 801 *et seq.*, the history of which led the court to conclude that Congress " 'intended to tolerate only the minimum anticompetitive behavior * * * in the maritime industry' " (465 F.2d at 551-552 (emphasis omitted), quoting *Seatrain Lines, Inc.* v. *Federal Maritime Comm'n,* 460 F.2d 932, 940 (D.C. Cir. 1972)). Similarly, in *Northern Natural Gas,* the D.C. Circuit expressly recognized the balancing approach set forth in *Gulf States* and followed by the court of appeals in the present case (399 F.2d at 961). Thus, there is no merit to petitioners' contention that the court of appeals' decision in the present case conflicts with any decision of this Court or any other court of appeals.

Furthermore, to whatever extent BPA may be said to have a nonstatutory yet judicially enforceable duty to promote competition, the pro rata allocation of Intertie access among BPA and other Northwest utilities furthers rather than hinders the goal of most closely approximating competitive conditions. As the Administrator has recently emphasized, "[p]ro-rata allocations under various Intertie

access policies have always been intended to mirror and offset pro-rata allocations in the Southwest. California commenters argue that pro-rata allocations under the LTIAP tend to stabilize prices at levels higher than where sellers may increase their total sales by reducing prices. It is equally logical to conclude that pro-rata allocations of California Intertie capacity suppress prices below levels that would prevail in a market where more buyers bid independently." LTIAP Administrator's Decision 61-62 (footnote omitted); see also Pet. App. A18-A20.

Although petitioners insist that BPA cannot take such considerations into account because it "is *not* a regulatory agency" (CEC Pet. 27 (footnote omitted)), petitioners cannot have it both ways. If BPA, because it is a federal agency, is to be assigned the responsibility to weigh competitive considerations in its decisionmaking, then there is no reason why BPA must close its eyes to the competitive consequences of all actions but its own.[17] BPA properly

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[17] In arguing that "BPA ignored the well-settled rule that those who commit antitrust violations may not justify such conduct on the ground that it was undertaken to compensate for or retaliate against antitrust violations by their adversaries" (CEC Pet. 27), petitioners err by treating BPA as if it were an entity that could "commit antitrust violations." BPA is a federal agency and is thus exempt from the antitrust laws; any bearing that antitrust considerations have on BPA's decisionmaking derives simply from the obligation every federal agency has to consider relevant factors in making decisions. See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944). Factors that may not justify a private actor's conduct may nevertheless be appropriate considerations for a federal agency. Moreover, petitioners err in their implicit assumption that it would necessarily violate the antitrust laws for a private utility that owned a transmission line to allocate its sales of transmission services on a pro rata basis. Although the *joint* owners of a "bottleneck monopoly" facility may be required to give their competitors nondiscriminatory access to that facility (*United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 410-411 (1912)),

considered the relative market power of the southern Intertie owners and Northwest utilities in formulating its Intertie access policies.[18]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DENNIS G. LINDER
WM. ROBERT IRVIN
Attorneys

HARVARD P. SPIGAL
General Counsel
Bonneville Power Administration

AUGUST 1988

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and the sole owner of such a facility may in some circumstances be forbidden to *exclude* its competitors from access to that facility (*Otter Tail Power Co.* v. *United States, supra*), we are unaware of any antitrust case that goes so far as to require the owner of such a facility to let market forces rather than a pro rata allocation system dictate access to the facility.

[18] Petitioners are also in error in suggesting (CEC Pet. 25) that BPA does not enhance its own ability to collect revenues, and thus to meet its obligation to be self-financing, by aiding the market power of Northwest utilities. The Administrator has explained in the recent decision supporting the LTIAP the indirect revenue effects on BPA of increasing or decreasing the revenues of Northwest utilities (LTIAP Administrator's Decision 50-51, 61 n.18).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60581